

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**IN RE U.S. DEPARTMENT OF JUSTICE
MOTION TO COMPEL FACEBOOK TO
PROVIDE TECHNICAL ASSISTANCE IN
SEALED CASE, OPINION ISSUED IN OR
ABOUT SEPTEMBER 2018**

Misc. Case No. 1:18-mc-00057-LJO-EPG

**ORDER DENYING MOTIONS TO
UNSEAL (ECF Nos. 1 & 3); ORDER TO
SEAL RESPONSIVE FILINGS**

I. BACKGROUND AND ISSUES

On November 28, 2018, Applicants American Civil Liberties Foundation (“ACLU”) and W.P. Company LLC, dba The Washington Post, filed applications for the Court to unseal its court ruling pertaining to the U.S. Department of Justice (“DOJ”) and Facebook, Inc (“Facebook”).

On February 7, 2018, both DOJ and Facebook filed responses to the pending applications. Due to the substantive nature of the responses that parallel the reasons the proceedings were sealed in the first instance, both of their requests to allow the sealing of those responses are hereby GRANTED.

The original motions, requests, substantive documents in support and in opposition, evidentiary hearing, and resulting Court Order of Decision were closed and sealed, upon motion and request, because the Court determined and made findings that:

1. The Government's assertion that disclosure of the legal materials, testimony, and ultimate Order would jeopardize both the then-current and subsequent criminal investigations of

1 future cases (both categories involving and emanating from Title III wiretap processes)

2 was a valid and legitimate factual and legal concern; and

- 3 2. Facebook's assertion that its internal processes that were the subject of the Government's
4 motion constituted trademark and protected material and information, and that public
5 disclosure would provide such protected information to competitors, thereby jeopardizing
6 substantial business quality, productivity, and profit, was legitimate, true, and reasonable.

7 The Government opposes the instant requests to unseal. Facebook supports the requests on the
8 condition that any disclosed materials be subject to limited redaction.

9 The issues raised by the requests to unseal are:

- 10 • whether the public has First Amendment and common law rights of access to the court
11 records sought; and
12 • if so, whether the Government has articulated compelling reasons that outweigh the public's
13 right of access.

14 **II. DISCUSSION**

15 The Court recognizes that Applicants are handicapped in their argument due to their almost non-
16 existent factual knowledge. The Court, however, also understands that to provide Applicants with the
17 information that would allow them to be convinced of the need to seal would swallow the very issues
18 that resulted in the closed hearing and sealing of records. That said, the statutory presumption against
19 Title III materials is not as narrow as Applicants claim, especially under the instant factual scenario.
20 There can be no dispute that the requested materials contain and pertain to sensitive wiretap information
21 that implicates directly the very purpose of the Title III statutory scheme of nondisclosure. *See* 18 U.S.C.
22 §§ 2517, 2518. Trying to separate that information from any non-covered material is simply impossible.

23 The unsealing and disclosure of Title III is governed by a comprehensive statutory scheme that
24 establishes a presumption against disclosure. Title III prohibits all disclosures not authorized by statute.
25 18 U.S.C. §§ 2517(1)-(8). The purpose of Title III, including the provisions governing disclosure of

1 wiretap materials, makes it clear that Congress intended such material to remain confidential and
2 “clearly negate(s) a presumption in favor of disclosure.” *In Re the Matter of the Application of the New*
3 *York Times Co.*, 577 F.3d 401, 408-10 (2nd Cir. 2009); *see also United States v. Kwok Cheung Chow*,
4 No. 14-CR-00196 CRB JCS, 2015 WL 5094744, at *3 (N.D. Cal. Aug. 28, 2015).

5 All of the materials Applicants seek are Title III wiretap materials that directly flow from orders
6 granting Title III wiretap requests. Therefore, this Court cannot ignore the statutory language that
7 protects the confidentiality of these materials. In attempting to determine whether such materials are
8 subject to a First Amendment right of access, a Court must determine whether this type of
9 information/proceeding has traditionally been conducted in an open fashion, and whether public access
10 to the information/proceeding would serve to curb prosecutorial and/or judicial misconduct or would
11 further the public’s interest in understanding the criminal justice system. *Oregonian Publ’g Co. v U.S.*
12 *Dist. Court for Dist. Of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990). “This two-part test is commonly
13 referred to as the ‘experience and logic’ test.” *United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017).
14 “Even when the experience and logic test is satisfied, however, the public’s First Amendment right of
15 access establishes only a strong presumption of openness, and the public still can be denied access if
16 closure is necessitated by a compelling governmental interest, and is narrowly tailored to serve that
17 interest.” *Id.* (internal quotation omitted); *see also Chow*, 2015 WL 5094744, at *2 (applying experience
18 and logic test to materials covered by Title III).

19 Here, following the reasoning set forth in *N.Y. Times*, 577 F.3d at 410, the Court agrees with the
20 Government that: (a) under the history-and-logic test, Title III wiretap materials are generally not
21 subject to disclosure because there is no historical tradition of open access to Title III proceedings; and
22 (b) Applicants have failed to present any basis upon which this Court could adopt their view that public
23 policy favors public involvement in matters such as those presented here over Congress’ preferred
24 public policy as expressed in Title III itself. *See also United States v. Blagojevich*, 662 F. Supp. 2d 998,
25 1004 (N.D. Ill. 2009) (finding “no historical tradition of open public access to Title III materials” and

1 rejecting public policy arguments that contradict Congress' concern for confidentiality and privacy
2 reflected in the text and legislative history of Title III). Accordingly, no qualified First Amendment right
3 of access attaches to the materials/procedures sought.

4 Even if the qualified right did attach, the compelling interest of the DOJ to preserve the secrecy
5 of law enforcement techniques in Title III wiretap cases overwhelms that qualified right. The materials
6 at issue in this case concern techniques that, if disclosed publicly, would compromise law enforcement
7 efforts in many, if not all, future wiretap investigations. In addition, in the instant case, the investigation
8 is ongoing. *See In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 293 (4th
9 Cir. 2013) (agreeing that government's interests in maintaining the secrecy of its investigation,
10 preventing potential subjects from being tipped off, or altering behavior to thwart an ongoing
11 investigation, outweighed public interest in disclosure of materials covered by the Stored
12 Communications Act). Disclosure under these circumstances is exactly what the relevant statutory
13 provisions attempt to preclude.

14 Redaction of sensitive information is not a viable option here, as sensitive investigatory
15 information is so thoroughly intertwined with the legal and factual arguments in the record such that
16 redaction would leave little and/or misleading substantive information. In sum, the requested material is
17 so entangled with investigatory secrets that effective redaction is not possible.

18 The Court also finds that the common law right of access does not attach to the materials
19 requested. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) ("there is no right
20 of access to documents which have traditionally been kept secret for important policy reasons"). Title
21 III supersedes any arguable common law right. *N.Y. Times*, 577 F.3d at 405.

22 The important policy reasons to preserve the secrecy of the Title III criminal investigation are
23 present and remain intact in this case. The interests of the public are outweighed in favor of non-
24 disclosure based on the relevant facts and circumstances here. After balancing these interests as required
25 under *United States v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S.*

1 *of Billings, Mont.*, 658 F.3d 1188, 1192 (9th Cir. 2011), the Applications for disclosure fall short and are
2 therefore DENIED.

3
4 IT IS SO ORDERED.

5 Dated: February 11, 2019

 /s/ **Lawrence J. O'Neill** _____
 UNITED STATES CHIEF DISTRICT JUDGE